No. 193

In the Supreme Court of the United States

OCTOBER TERM, 1942

PHILLIPS-BUTTORFF MANUFACTURING COMPANY,
PETITIONER

v.

WILLIAM JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE, IN OPPOSITION

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OPINIONS BELOW

The opinion of the Chancery Court of Davidson County, State of Tennessee (R. 22-28), is reported in 5 Wage Hour Rept. 112. The opinion of the Supreme Court of Tennessee (R. 30–34) is reported in 5 Wage Hour Rept. 300, 160 S. W. (2d) 893.

JURISDICTION

The decree of the Supreme Court of Tennessee (R. 34) was entered on April 4, 1942. The petition for a writ of certiorari was filed on July 1, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether a watchman whose duty it was to guard three buildings in which petitioner carried on commerce and production for commerce, was "engaged in commerce or in the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act, c. 676, 52 Stat. 1060, provide as follows:

> SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates— * * *
>
> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce— * * *
>
> SEC. 3. As used in this Act— * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

STATEMENT

On January 28, 1941, respondent filed in the Chancery Court of Davidson County, Tennessee, a bill in equity against petitioner, alleging that during the time he was employed by petitioner respondent was engaged in commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act but had not been paid the minimum wage or overtime compensation required by Sections 6 and 7 of the Act (R. 1–4). A decree against petitioner for the unpaid wages plus an added equal amount as liquidated damages and a reasonable attorney's fee was prayed (R. 4). After a demurrer (R. 6) to an amended bill (R. 7–11) had been overruled by the court (R. 11–13), the parties entered into a stipulation of facts (R. 16–22) which constitutes the entire proof in this case. The facts, as stipulated, may be summarized as follows:

Respondent was employed by petitioner for a period of fourteen weeks during 1940 as a watchman to guard against loss by fire, theft or in other manner three buildings owned and operated by petitioner and their contents (R. 19, 21). The three buildings are located, respectively, on First, Second, and Third Avenues, North, in Nashville, Tennessee (R. 16–17). The First Avenue building [1]

[1] This is in fact two buildings (R. 18); for ease of reference, they are referred to by petitioner and in this brief as a single unit.

is used by petitioner primarily as a wholesale warehouse; 35 percent of the varied merchandise kept there is sold and shipped by petitioner in interstate commerce (R. 18-19). In the Second Avenue building petitioner maintains a shop employing fifty men and a wholesale establishment with a staff of forty employees (R. 17-18). In the shop petitioner manufactures "large quantities" of hardware and bulky metal articles, 35 percent of which are sold and shipped by petitioner in interstate commerce (R. 17). The wholesale establishment handles the products of the shop and also "large quantities" of a wide variety of other goods; 35 percent of the sales of this establishment are in interstate commerce (R. 18). The Third Avenue building contains a retail store, the executive offices for all of petitioner's enterprises,[2] wherein they are directed and managed, and a tin shop (R. 17, 19). It does not appear from the stipulation whether or not goods are produced for commerce in the tin shop (see R. 7–8, 14).

Respondent's regular nightly rounds consisted of hourly inspections of each floor of the Third Avenue building, and two visits per night to each

[2] Petitioner also owns and occupies a fourth building, located on Twelfth Avenue North, in Nashville, where it manufactures "large quantities" of heaters, stoves, furnaces, and stokers; a major portion of these products are shipped by petitioner to purchasers in other states (R. 19). Respondent did not perform watchman services with respect to this building (R. 19).

floor of the other buildings (R. 19–20). It took respondent one-half hour to cover the First and Second Avenue buildings, which he did twice in each work night of thirteen hours (R. 20, 21), and a half hour to make each round of the Third Avenue building. The scheduled rounds involved registering at a certain time at each of the thirteen call boxes located in the three buildings (R. 20). Between these regular inspections, respondent spent most of his time at the Third Avenue building, except when loiterers or other circumstances indicated that an additional visit to either of the other buildings was desirable (R. 20). Respondent worked a seven-day week of ninety-one hours for a fixed salary of $15.00, or 16.5 cents per hour (R. 21). It was stipulated that if respondent was entitled to the benefits of the Act, his weekly compensation should have been $34.65, yielding a recovery of $275.10 plus an equal sum as liquidated damages under Section 16 (b), and an attorney's fee of $183.40, or a total recovery of $733.60 (R. 21).

The Chancery Court held that respondent was covered by the Act and decreed recovery in the stipulated amount (R. 22–29). The Supreme Court of Tennessee affirmed the decree (R. 30–34).

ARGUMENT

This case does not involve any question of importance or general application in the administration and interpretation of the Fair Labor Stand-

ards Act. It is settled that the activities of a watchman discharging duties such as respondent's may bear the relation to interstate commerce or production for commerce which is the basis of coverage under the Act. *Kirschbaum* v. *Walling,* No. 910, October Term, 1941, decided June 1, 1942. Nor can there be any doubt that respondent's activities were fully as necessary and important to petitioner's production and interstate business as were those of the watchmen in the *Kirschbaum* case (see R. 19).

Petitioner advances two contentions in support of its view that the relation of respondent's duties to commerce and production for commerce was "tenuous and insubstantial" (Pet. 4). First, it asserts that the business and manufacture carried on at the First and Second Avenue buildings was "predominantly intrastate in character" (Pet. 9, 2, 8). Second, it contends that an insufficient amount of respondent's working time was spent in guarding those two buildings (Pet. 3, 8, 9). Neither contention calls for review of the decree below.

1. The mere fact that 65 percent of the business and production was intrastate in nature does not establish that the remainder was not substantial and important. *Santa Cruz Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467. The stipulation deals only in terms of percentages, the total

production and shipment being described only as made up of "large quantities" (R. 17–19). The courts below were plainly warranted, from such description and from the apparent scope of petitioner's enterprises, in believing that 35 percent of the total business and production done at the First and Second Avenue buildings was "more than that to which courts would apply the maxim *de minimis.*" *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 607; cf. *United States* v. *Darby,* 312 U. S. 100, 123.

2. Petitioner's assertion that less than 10 per cent of respondent's working time was spent in watching the First and Second Avenue buildings (Pet. 3, 8)[3] is not accurate. One-half of each hour was spent in making the rounds of the Third Ave-

[3] Petitioner also asserts that "by actual computation less than three percent of [respondent's] time had even the slightest connection with interstate commerce" (Pet. 3). This computation is accomplished by dividing the 10 percent allocated by petitioner to the First and Second Avenue buildings into segments corresponding to the 65 percent interstate and 35 percent intrastate business carried on at those buildings. The inextricable intermingling of the two kinds of business insofar as respondent's protective functions are concerned does not, of course, remove the basis for exercise of the federal commerce power. *United States* v. *Darby,* 312 U. S. 100, 121–122; *Shreveport Case,* 234 U. S. 342, 351–352; *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *Florida* v. *United States,* 282 U. S, 194; *Southern Ry. Co.* v. *United States,* 222 U. S. 20, 26–27; *Moore* v. *C. & O. Ry. Co.,* 291 U. S. 205, 213–214.

nue building. During the other half of each hour not spent in inspecting the First and Second Avenue buildings, the respondent's services were available at any of the buildings, and while he spent most of such time in the Third Avenue building, he made occasional additional trips to the other buildings as the need arose (R. 19–20). Furthermore, respondent's activities during the periods regularly spent in guarding the executive offices from which all of petitioner's enterprises were managed and directed (R. 17, 19) come well within the rationale of *Kirschbaum* v. *Walling, supra.* In any event, petitioner's contention that federal regulation of wages and hours of employees whose activities bear the necessary relation to commerce must turn upon the respective number of hours spent on interstate and intrastate business is supported by neither reason nor authority. Cf. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612, 616-619; see cases cited *supra,* note 3, p. 7.

CONCLUSION

Some of respondent's activities bore a relation to interstate commerce which supports application of the Act under settled principles. The only question presented is whether those activities are of a sufficient quantity. The correctness of the decision below turns entirely upon the particular facts of this case and review by this Court would settle no principles that would necessarily or prob-

ably dispose of other cases under the Act. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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